Supreme Court, U.S.
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No. 00-1080

IN THE

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION AND JOHN R. WILLSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent National Association of Securities Dealers, Inc. has no parent companies and no public shareholders.

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Respondent National Association of Securities Dealers, Inc. ("NASD") submits this brief in opposition to the petition of Randy Britton ("Britton") for a writ of certiorari.

STATEMENT OF THE CASE

This case concerns the termination of Britton's employment at the securities firm of Donaldson, Lufkin & Jenrette Securities Corp. ("DLJ") in late 1991. That event was set in motion by Britton's failure, after being hired by DLJ earlier in 1991, to disclose certain information about himself in response to Question 22B on Form U-4, Uniform Application for Securities Industry Registration or Transfer. (Pet. App. 16a, 28a-31a).[1] In order to work in the securities industry, the Securities and Exchange Commission ("SEC") requires securities brokers and certain other persons employed by securities firms to be registered with at least one national securities association such as the NASD or a national securities exchange such as Respondent New York Stock Exchange (17 C.F.R. § 240.15b7-1), and registration in such organization requires submission of a Form U-4 (Pet. App. 52a-53a).

The NASD is a self-regulatory private corporation registered with the SEC as a national securities association.[2] As an integral part of a comprehensive system of federal regulation of the securities industry, the NASD regulates the

1. "Pet. App." followed by a page number refers to a page in Petitioner's Appendix in his Petition for a Writ of Certiorari.

2. The summary in this paragraph about the NASD is borrowed from the recent decision in *Desiderio v. National Association of Securities Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 756 (2001).

over-the-counter securities market, which includes securities firms and registered representatives who buy and sell over-the-counter securities. Its authority is exercised under the close supervision of the SEC, which must approve all the NASD's rules and regulations. The Form U-4, in each of its versions, has been approved by the SEC. *See, e.g.*, Securities Exchange Act Release No. 41560 (June 25, 1999), 64 Fed. Reg. 36059 (July 2, 1999) (File No. SR-NASD-98-96) (approving most recently the electronically submitted Form U-4); *see also* Pet. App. 52a (concerning original SEC approval of the Form U-4 in 1975).

Insofar as the NASD is concerned, Britton's case is directed at the validity of Question 22B on the Form U-4.[3] That question requires applicants for jobs as securities brokers to disclose certain criminal charges even when the charges did not result in convictions. Britton specifically alleges that the challenged question constitutes race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

Question 22B is mandated by SEC Rule 17a-3(a)(12)(i)(g) codified at 17 C.F.R. § 240.17a-3(a)(12)(i)(g). Insofar as relevant here, that regulation requires all NASD members to include in each application for employment executed by an "associated person," such as Britton was at the time, a "record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate . . . fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion, and the disposition of the foregoing."

3. The question is now 23B, but that is immaterial for present purposes.

By order of March 8, 1996 the United States District Court for the Southern District of New York held that it lacked subject matter jurisdiction over Britton's challenge to Question 22B because Britton had failed to exhaust his administrative remedies with the SEC (Pet. App. 22a-23a). That order was among those included in the order of summary affirmance by the United States Court of Appeals for the Second Circuit as to which Britton now petitions for a writ of certiorari.

In its March 8, 1996 order the District Court expressly declined to adopt the recommendation of the Magistrate Judge to whom the case had been referred that the Title VII claim might also be dismissed because neither the NASD nor the New York Stock Exchange ("NYSE") was Britton's employer (Pet. App. 23a, 53a-55a). Accordingly, the courts below disposed of Britton's challenge to the non-conviction arrest record question exclusively on grounds of failure to exhaust administrative remedies and did not reach the issue of the applicability of Title VII to the NASD and the NYSE, although Britton now includes that issue among his "questions presented." The courts below also did not reach consideration of whether the NASD and the NYSE might be state actors, the other one of the four "questions presented" by Britton that pertains to the NASD.[4]

In the nearly five years since the District Court's decision that Britton had failed to exhaust his administrative remedies with respect to the Form U-4, the SEC has twice

4. The two questions Britton presents about the Form U-5 concern whether DLJ should have filed a Form U-5 in connection with Britton's termination of employment and whether the statements made on the form by DLJ are entitled to an absolute privilege under state law. Those claims are directed solely at DLJ.

solicited comments concerning changes to the Form. *See* Securities Exchange Act Release No. 41326 (April 22, 1999), 64 Fed. Reg. 23366 (April 30, 1999) (File No. SR-NASD-98-96) and Securities Exchange Act Release No. 37289 (June 7, 1996), 61 Fed. Reg. 30272 (June 14, 1996) (File No. SR-NASD-96-19). Britton did not avail himself of the opportunity to participate in those proceedings. He has also never petitioned the SEC for amendment or repeal of Rule 17a-3(a)(12)(i)(g), as he has the right to do under 17 C.F.R. § 201.192 — the rule in which the SEC has embodied its procedures fulfilling the Congressional directive that "[e]ach [administrative] agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(e).

REASONS FOR DENYING THE WRIT

BRITTON'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES PRESENTS NO SIGNIFICANT LEGAL ISSUE

Far from presenting an important question, this case involves only Britton's continuing refusal to exhaust administrative remedies before seeking judicial relief. As this Court has recognized:

> Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.

Reiter v. Cooper, 507 U.S. 258, 269 (1993) (*citing Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)).

The proper forum for Britton to resolve his challenge to Question 22B on the Form U-4 and the SEC rule from which it derives is not a federal district court, but an administrative proceeding at the SEC[5] with public notice and participation followed by judicial review exclusively in the appropriate United States Court of Appeals designated by statute. 15 U.S.C. §§ 78y(a)(1) and (b)(1). In such a proceeding Britton could raise his Title VII and public policy concerns, while other interested persons could also be heard. As the Second Circuit has pointed out:

> The rationale behind the exhaustion doctrine is that a court's refusal to intervene prematurely in the administrative process gives the agency the opportunity to develop factual findings, to apply its expertise to new issues and to exercise its discretionary powers.

Touche, Ross & Co. v. SEC, 609 F.2d 570, 574 (2d Cir. 1979).

In the nearly eight years since he initiated this case Britton has neither availed himself of the opportunities presented by the SEC to participate in public comments on changes to Form U-4 nor has he petitioned the SEC for a rule change. Whatever the merits of Britton's attack on SEC Rule 17a-3(a)(12)(i)(g) and Question 22B on Form U-4, the proper forum for their resolution is not in this case, which is primarily concerned with his termination of employment at DLJ, but in an administrative proceeding at the SEC with the requisite public notice and participation and judicial

5. Britton could either petition the SEC for a rule change at any time under the procedures set forth in 17 C.F.R. § 201.192, or, if he prefers, await an opportunity when the SEC next solicits comments concerning changes to the Form U-4.

review in the appropriate United States Court of Appeals. That is the procedure which Congress mandated, and Britton has not brought forward any reason for departing from it here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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